UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHAWN HINKLEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 97-388-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

The parties to this Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal agree that remand is appropriate in light of the Commissioner's failure to follow the prescribed procedure for evaluating mental impairments. The plaintiff further contends that additional bases for remand exist, including one that would justify a remand with directions to award him benefits. Limiting myself, as discussed *infra*, to those contentions that the plaintiff has properly presented to the court for its consideration, I discern no additional bases for remand beyond the agreed-upon one and thus recommend remand solely for the purpose of requiring the Social Security Administration to evaluate any mental impairments according to the prescribed procedure.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§

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[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 12, 1998, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5. 6 (1st Cir. 1982), the Administrative Law Judge found that the plaintiff had not engaged in substantial gainful activity since May 30, 1995, Finding 2, Record p.32; that he had advanced cervical degenerative changes with a kyphotic deformity, impairments that were severe but that did not meet or equal any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p.33; that he was unable to perform his past relevant work as a carpet installer, clam digger and carpenter, Finding 7, Record p. 33; that he had the residual functional capacity to perform the full range of light and sedentary work; Finding 8, Record p. 33; and that, based on an exertional capacity for light work as well as the plaintiff's age (33), education (high school) and work experience (semi-skilled), application of the Medical Vocational Guidelines, 20 C.F.R. Part 404, Subpart B, Appendix 2 (the "Grid"), directed the Administrative Law Judge to conclude that the plaintiff was not disabled, Findings 9-12, 14, Record p. 33, 34. The Administrative Law Judge also determined that, even if the plaintiff's residual functional capacity were subject to additional limitation such that he was unable to perform the full range of light and sedentary work, he would still be able to make the adjustment to work that exists in significant numbers in the national economy and would thus still be found not disabled. Finding 13, Record p. 34. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir.1996). In other words, the determination must

be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

I. Evaluation of Mental Impairments

Among the errors asserted by the plaintiff is one that concerns the Administrative Law Judge's determination that, although the plaintiff "has or has had affective [and] anxiety . . . disorders" they were not severe impairments within the meaning of the Social Security Act. *See* Finding 4, Record p. 33. According to the plaintiff, it was error requiring remand for the Administrative Law Judge to make such a finding without completing a Psychiatric Review Technique ("PRT") form pursuant to 20 C.F.R. §§ 404.1520a and 416.920a. The Commissioner indicated at hearing that he is in agreement with this position.[2] I therefore recommend a remand for the purpose of requiring the Commissioner to complete a PRT form.

II. Procedural Defaults

Concerning the plaintiff's remaining contentions, the state of the record necessitates the precise delineation of exactly what issues are properly before the court.

Pursuant to the applicable local rules, Social Security disability appeals are assigned to the court's administrative case-management track, which does not provide for the kind of extensive written motion practice that arises in the typical civil case. *See* Loc. R. 16.3(a)(2). Obviously, the

[2] Indeed, one day prior to oral argument and well after the May 29, 1998 deadline established by the court for such requests, the Commissioner sought leave to file his own motion for remand. Finding no good cause for the late filing of such a motion, I denied the request for leave on the record at oral argument.

objective is to promote the efficient resolution of Social Security cases, which do not involve any discovery or record development and which are of paramount significance to the lives of the plaintiffs who bring them. Under Local Rule 16.3(a)(2), a plaintiff is required to do two things prior to the issuance of a recommended decision by a magistrate judge: (1) submit "an itemized statement of the *specific errors* upon which the plaintiff seeks reversal of the Commissioner's decision," along with a fact sheet, and (2) appear at an oral argument to "set forth the *specific errors* about which the plaintiff complains" with citation to "statute, regulation, . . . case authority" and, as necessary, "transcript references." *Id.* (emphasis added). Both requirements are integral to the process, the former allowing the court and the Commissioner to prepare effectively for the oral argument at which the asserted errors receive their full exploration.

In my view, a plaintiff who seeks to raise at oral argument issues that are not presented in his or her itemized statement of errors risks a determination that such issues have been procedurally defaulted. Here, the itemized statement of errors initially filed by the plaintiff (Docket No. 4) lacked sufficient specificity to alert the court and the Commissioner as to the asserted grounds for relief. Rather, the plaintiff simply noted that he had already made his views known to the Administrative Law Judge and to the Appeals Council with various written filings and that, pursuant to those filings, the Commissioner's decision is at variance with six Social Security Rulings cited *seriatim.*[3] Seeking

[3] I do not mean to suggest that a plaintiff in a Social Security disability appeal could never comply with Local Rule 16.3(a)(2) by, in part, referring the court to briefs that are of record and were submitted to agency decisionmakers. I do, however, regard it as an improvident practice, given that the standard of review applicable here is different than that employed at previous stages in the process. In any event, the key is whether the itemized statement of errors is sufficiently specific so that the court is not left to guess at what bases exist for the requested judicial relief. *See generally CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1526 (1st Cir. 1996) ("raise-or-waive" rules in civil litigation mean that court will not do "homework" for litigants and plaintiffs (continued...)

to avoid the risk that some valid basis for relief would miss detection by the court, I directed the clerk's office to invite the plaintiff to submit a second and more specific itemized statement, which he did. *See* Amended Itemized Statement of Errors ("Itemized Statement II") (Docket No. 5).

In one key respect the revised itemized statement of errors is no more specific than its predecessor. The section of this document in which the plaintiff asserts that the Commissioner failed to comply with certain Social Security Rulings issued in 1996 reads, in its entirety, as follows: "This matter has been previously addressed by Plaintiff below at T10-13 [i.e., Record pp. 10-13], discussing, in sequence, SSR's 96-3(p), 96-4(p), 96-7(p), 96-2(p), 96-6(p), and 96-5(p). Plaintiff's brief below is specifically incorporated herein by reference." Itemized Statement II at 2. The referenced brief, submitted to the Appeals Council, is confusing and poorly organized. At oral argument, the plaintiff opted not to discuss the Commissioner's compliance with Social Security Rulings 96-3(p), 96-7(p), 96-2(p) and 96-5(p), after being advised that the court would not comb the record to ascertain the Commissioner's level of compliance with all applicable regulations and rulings. In these circumstances, I treat any issues related to Social Security Rulings 96-3(p), 96-7(p), 96-2(p) and 96-5(p) as waived. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived") (citations omitted). In the rebuttal portion of his oral argument, the plaintiff referred glancingly to Social Security Rulings 96-4p and 96-6p. In no sense are these references anything approaching developed argumentation, and thus any contentions as to these two Social Security Rulings are also properly treated as waived.

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[3](...continued)
must put "best foot forward in an effort to present some legal theory that will support" claim) (citations omitted).

III. Step 3: The Listings

Among the issues duly raised by the plaintiff in both his itemized statement of errors and at oral argument is his contention that the Commissioner erred at Step 3 in determining that the plaintiff's impairments did not meet Listing 1.05, which concerns disorders of the spine. Specifically, the plaintiff's position is that the Administrative Law Judge should have determined that the plaintiff met the "C" criteria of Listing 1.05, which concerns "[o]ther vertebrogenic disorders" and requires both "[p]ain, muscle spasm, and significant limitation of motion in the spine" as well as "[a]ppropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss." 20 C.F.R. § 404, Subpart P, Appendix 1 at ¶ 1.05(C). The conditions must have persisted for at least three months and must have been expected to last at least 12 months. *Id.*

The Administrative Law Judge determined that the plaintiff's impairments did not meet Listing 1.05(C) because "there has been no documentation that muscle spasm, muscle weakness, and reflex and sensory loss" have persisted and were expected to last for the requisite durations. Record p. 23. According to the Administrative Law Judge, the plaintiff's muscle spasms and serious pain had abated by October 16, 1995, some four and a half months after he suffered a neck injury in a car accident. *Id*. at 20, 23. On October 16, as noted by the Administrative Law Judge, the plaintiff was examined by Alan P. Neuren, M.D., who noted no substantial pain, good motor strength in all four extremities, appropriate responses to a sensory exam and "unremarkable" gait and station. *Id*. at 23, 248-49. Neuren's diagnosis was "Lhermitte's Phenomenon." *Id*. at 249. *See Taber's Cyclopedic Medical Dictionary* (14th ed.) at 815 (describing "Lhermitte's sign" as a pain symptom "resembling a sudden electric shock throughout the body by flexing the neck"). The Administrative Law Judge

further noted that a neurologist, Lee Thibodeau, M.D., examined the plaintiff on December 19, 1995 and recorded a "normal neurological examination." Record at pp. 23, 257. Further, the Administrative Law Judge acknowledged that the plaintiff saw Michael Bither, M.D., in May 1996 to complain of numbness and weakness in both arms that he had been experiencing for two to three weeks upon waking. *Id*. at 23, 300. Neurologist Bernard Vigna, M.D., examined the plaintiff in June 1996 and, as noted by the Administrative Law Judge, found a moderate limitation in the plaintiff's range of cervical motion and parasthesia in the arms upon neck movement. *Id*. at 23-24, 308. Vigna recommended that Bither pursue a "conservative approach" as treating physician. *Id*. at 309.

In neither his written submissions nor at oral argument did the plaintiff address the question of how the Administrative Law Judge erred in relying on this evidence to make his finding at Step 3 and, thus, why the court should determine that the finding lacks the requisite evidentiary support. Instead, the plaintiff furnishes, without elaboration, a series of record citations that, he asserts, demonstrate that the "C" criteria of the Listing were "present," "consistent over time" and "relate back" to the asserted onset of disability on May 30, 1995. Itemized Statement II at 1. Even assuming that the cited references to the record demonstrate that the relevant criteria were present at the times noted in the documents at issue, I must agree with the Commissioner that these citations provide no basis for disturbing the Administrative Law Judge's determination, firmly grounded in the record, that the durational requirements of the Listing had not been satisfied. *See, e.g., Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987) (noting claimant's burden at Step 3 and court's duty to affirm when substantial evidence supports Administrative Law Judge's negative determination as to Listing severity).

IV. Step 5

Finally, the plaintiff relies on this court's decision in *Field v. Chater*, 920 F.Supp. 240 (D.Me. 1995), to contend that he is entitled to a remand with directions to award him benefits in light of an erroneous determination at Step 5. According to the plaintiff, the ultimate finding of non-disability at Step 5 is fatally flawed in light of the testimony of the vocational expert, who rendered an opinion at the hearing about the availability of work the plaintiff was capable of performing. *See Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994) (reliance on vocational expert testimony impermissible when hypothetical posed to expert inaccurately conveys claimant's functional limitations). Under *Field*, a remand with directions to award benefits is appropriate when the Commissioner, who has the burden of proof at Step 5, fails to meet that burden because of flawed testimony by a vocational expert. *See Field*, 920 F.Supp. at 244.

A threshold problem, not explicitly addressed by the plaintiff in writing or at oral argument, is that the Administrative Law Judge essentially made two alternative findings of non-disability at Step 5. His initial determination, based on a capacity to perform the full range of light and sedentary work, is that a finding of non-disability is appropriate pursuant to Grid Rules 202.21 (light work) and 201.28 (sedentary work). Finding 12, Record p. 33. In the alternative, the Administrative Law Judge relied on the vocational expert's testimony to determine that, "[e]ven if the claimant were unable to perform the full range of sedentary or light work, he is capable of making an adjustment to work which exists in significant numbers in the national economy." Finding 13, Record p. 34 (citing cashier, telephone order clerk and sales clerk as jobs plaintiff capable of performing). The heart of the plaintiff's objection to the vocational expert's testimony is that, in rendering her opinion, she was

not asked to assume that the plaintiff suffered from chronic pain. It thus logically follows that the plaintiff challenges the alternative determination, that he was able to perform the full range of light and sedentary work without any limitation because of pain, even though the plaintiff did not but should have made this explicit in the circumstances.

At oral argument, the plaintiff furnished a list of citations to his hearing testimony, at which he alluded extensively to his pain symptoms. The Administrative Law Judge determined that the plaintiff's statements concerning his impairments were "not entirely credible in light of the inconsistency of his allegations, the statements of others, the degree of medical treatment required, the reports of the treating and examining practitioners, and the medical history." Record p. 24. The ensuing five single-spaced pages of discussion by the Administrative Law Judge take up in detail the basis of his unfavorable credibility assessment. *See id.* at 24-29. This would appear to be precisely the sort of analysis required of the administrative adjudicator when a claimant's allegations of pain are at issue. *See* Social Security Ruling 96-7p, *reprinted in West's Social Security Reporting Service*, Rulings 1983-91 (Supp. 1998) at 117.[4]

The plaintiff further contends that the assessment of his residual functional capacity is flawed

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[4] According to Ruling 96-7p,

> In determining the credibility of the individual's statements, the adjudicator must consider the entire case record, including the objective medical evidence, the individual's own statements about symptoms, statements and other information provided by treating or examining physicians or psychologists and other persons about the symptoms and how the affect the individual, and any other relevant evidence in the case record. An individual's statements about the intensity and persistence of pain or other symptoms or about the effect the symptoms have on his or her ability to work may not be disregarded solely because they are not substantiated by objective medical evidence.

SSR 96-7p at 117.

because it is based upon an erroneous characterization by the Administrative Law Judge of the testimony given at hearing by a medical advisor, neurologist John Boothby, M.D. In particular, the plaintiff takes exception to the Administrative Law Judge's finding that Boothby "stated that chronic pain was not a factor at the time of the hearing." *See* Record p. 23. The plaintiff draws the court's attention to Boothby's testimony that certain "sleep disturbance" experienced by the plaintiff was "probably more related to pain than anything else," *id*. at 66, a a later reference by the medical advisor to "neck pain," *id*. at 69, and Boothby's testimony that he was "not sure" the plaintiff had been "adequately treated over a long enough period of time with enough medications" to justify a finding that he suffered from chronic pain syndrome of Listing severity, *id*. at 70-71.

In my view, the Administrative Law Judge reasonably characterized Boothby's testimony and the plaintiff's contentions to the contrary are an effort to spin gold out of flax. The medical advisor's reference to pain-related sleep disturbance was by way of explaining his view that depression may also "play a role" in the plaintiff's problems with sleeping, eating and weight gain. *Id*. at 66. When Boothby later mentioned "neck pain," it was in the course of stating that he was "not sure" the plaintiff's potentially disabling conditions would exist apart from the evidence in the record of the plaintiff's substance abuse problems. *Id.* at 69.[5] As for the medical advisor's reference to chronic pain syndrome, the transcript speaks for itself:

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[5] It was at this point that the Administrative Law Judge decided to defer a decision on the plaintiff's application for benefits and refer him for a consultative examination by a psychiatrist. Record p. 69. The results of that examination, conducted by Richard Fortier, M.D., are of record. *See id.* at pp. 301-07. The hearing was ultimately recessed until Fortier could complete his examination and report on it, *see id*. at 82 (noting Fortier's determination of "inactive" substance abuse problems), and the Administrative Law Judge ultimately found that any "affective, anxiety, and substance addiction disorders" experienced by the plaintiff were not severe impairments within the meaning of the Social Security Act, Finding 4, Record p. 33.

> [Plaintiff's Counsel]: Have you considered or did you consider, in answering [the Administrative Law Judge's] question with respect to meeting or equaling [any of the Listings], the diagnosis of a chronic pain syndrome?
>
> [Medical Advisor]: I did.
>
> [Plaintiff's Counsel]: And you, and your conclusions on that were?
>
> [Medical Advisor]: I didn't think that, that he did at this point, I'm not sure that he's been adequately treated over a long enough period of time with enough medications to say that he meets that.

Id. at 70-71. In light of this testimony in particular, the Administrative Law Judge was entirely correct in characterizing Boothby as having expressed the view that the plaintiff was not suffering from chronic pain at the time of the hearing. Thus, the medical advisor's testimony does not provide a basis for disturbing the assessment of the plaintiff's residual functional capacity as posed to the vocational expert.[6]

V. Conclusion

The plaintiff is entitled to a remand for the purpose of requiring the Social Security Administration to follow its regulations concerning the evaluation of mental impairments by completing a PRT form. This is the sole basis established by the plaintiff for judicial relief. Accordingly, I recommend that the Commissioner's decision be **VACATED** and the cause remanded for proceedings consistent with the opinion herein.

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[6] The plaintiff further objects to an observation by the Administrative Law Judge in his opinion that "[p]rolonged neck flexion or extension does not significantly erode the light and sedentary work base." *See* Record p. 31. The suggestion is that such a determination would have to have been made, if at all, by the vocational expert. It is obvious that this reference in the decision was part of the Administrative Law Judge's determination that the Grid directed a finding of non-disability. Since the decision provides an alternative basis for the ultimate finding, grounded in the vocational expert's testimony, it is not necessary to take up the propriety of the challenged statement by the Administrative Law Judge.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of June, 1998.

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David M. Cohen
United States Magistrate Judge